Nos. 82-1248, 82-1278

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IN THE

Supreme Court of the United States

October Term, 1983

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant,

against

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR INTERVENOR-APPELLANT

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A. Pretrial Detention under New York Family Court Act § 320.5(3)(b) Is Not Unconstitutional Punishment.

Appellees ask the Court to invalidate New York Family Court Act ("FCA" or "the Act") § 320.5(3)(b) under the due process clause of the Fourteenth Amendment on the theory that detention to prevent pretrial crime is punishment without trial. Brief for Appellees ("appellees' brief" or "brief") at 94-106. The theory is drawn from *Bell* v. *Wolfish*, 441 U.S. 520, 535-40 (1979), and *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 167-70 (1963), and has no application in the case at bar. Properly invoked, the theory distinguishes between post-detention sanctions that are regulatory and can be implemented directly and post-detention sanctions that are punitive and require prior hearings. *Bell* v. *Wolfish*, *supra*; *Kennedy* v. *Mendoza-Martinez*, *supra*. It has no relevance in deciding if pretrial detention based on probable cause and a prior detention hearing is itself justified, the purpose for which appellees offer it. *See Bell* v. *Wolfish*, *supra*, at 533-35, 536-37 (1979); *id.* at 569 (*Marshall*, J. dissenting); *id.* at 581-84 (*Stevens*, J. dissenting).

Appellees' principal argument under their unconstitutional punishment theory (brief at 94-96, 98-106) depends on a distinction between detention under FCA § 320.5(3)(a) to assure appearance at trial, which they accept as permissible, or regulatory, under *Wolfish* and *Mendoza-Martinez*, and detention under § 320.5(3)(b) to prevent pretrial crime, which they reject as impermissible or punitive. *Compare* appellees' brief at 93 n.64 and accompanying text, 94-95 *with id.* at 101-106. The distinction is said to rest on differences between the two statutory detention standards which are constitutionally significant under *Wolfish* and *Mendoza-Martinez*. Appellees' brief at 95, 102-106. On examination, the asserted differences—in statutory purpose (brief at 95-96), relationship to the juvenile justice system (brief at 102-106) and effect on detained juveniles (brief at 104, 106)—are either non-existent or not significant. Accordingly, none supports the opposing characterizations and due process

outcomes appellees assign to § 320.5(3)(a) and § 320.5 (3)(b).

Disregarding the Court's advice that all seven factors listed in *Bell* v. *Wolfish*, 441 U.S. at 537-38, and *Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 168-69, be considered (*id.* at 169), appellees select three to illustrate the alleged significant differences between detention under FCA § 320.5(3)(b) and detention under § 320.5(3)(a), the subsection they concede is regulatory—whether the sanction, here pretrial detention under § 320.5(3)(b) in contrast to § 320.5(3)(a), promotes the traditional aims of punishment, retribution and deterrence; whether it applies to behavior that is already a crime; and whether it is rationally related to an alternative, non-punitive purpose. Appellees' brief at 101. Considering § 320.5(3)(a) and § 320.5(3)(b) under the three factors perforce discloses their different purposes. It also discloses that the crime prevention purpose of pretrial detention under § 320.5(3)(b), like the purpose of pretrial detention under § 320.5(3)(a), is alternative or non-punitive, that detention under § 320.5(3)(b) is no more an adjudication of pending criminal charges than detention under § 320.5(3)(a), that detention under § 320.5(3)(b) does not promote the traditional aims of post-trial punishment, or, more properly in the juvenile justice system in New York, post-adjudication dispositions for "supervision, treatment or confinement" (§§ 301.2[7], 352.1[1]) and that § 320.5(3)(b) stands in exactly the same relation to those aims as its concededly regulatory counterpart, § 320.5(3)(a).

A sanction involving an affirmative restraint on liberty has an alternative purpose if it is reasonably related to a legitimate governmental objective other than punishment. *Bell* v. *Wolfish*, 441 U.S. at 538-39; *United States* v. *Edwards*, 430 A.2d 1321, 1332 (D.C. App. 1981) (en banc), *cert. denied* 455 U.S. 1022 (1982). If the sanction's quality as punishment remains in doubt after its legitimate governmental objective is established, it may be reviewed to determine if it is "backward-looking, personal, and norma-

tive" and thus punishment, or "forward looking, general, and nonnormative" and thus alternative or non-punitive. *Bell* v. *Wolfish*, *supra*, at 581 n.10 (*Stevens*, J. dissenting); *United States* v. *Edwards*, *supra*, at 1332 n.29, and accompanying text. *Edwards*, *supra*, at 1332, examined the District of Columbia's adult preventive detention statute in light of these considerations and held its crime prevention purpose to be alternative or non-punitive. Preventing pretrial crime was accepted as a legitimate governmental objective in itself, and, under the other considerations, pretrial detention to prevent crime was indistinguishable from pretrial detention to assure appearance at trial. *Id.* The same results obtain from an examination of detention under FCA § 320.5(3)(b), both in terms of the governmental objectives involved in the standard and in comparison with detention under §320.5(3)(a) in light of the other considerations.

Appellees accept (brief at 95) prevention of pretrial crime as the purpose of detention under FCA § 320.5(3)(b), albeit mistakenly identifying it as an "express legislative purpose" (*id.*) when it simply appears from text.* They also accept the prevention of pretrial crime as permissible *arguendo* under the due process clause (brief at 56), acknowledge that New York's express community protection interest in § 320.5(3)(b) (*see* p. 3 n.*) was established below (brief at 25) and accept that interest as substantial, at least for some crimes (*see* pp. 12-17). Appellees' brief at 56.** Intervenor fairly assumes that appellees also accept

* New York has two express legislative purposes in FCA § 320.5 (3)(a) and § 320.5(3)(b) and in the other sections of the Act: the "needs and best interests" of the juvenile and the "need for protection of the community." § 301.1 *See* brief for Intervenor-Appellant ("intervenor's brief") at 7, 32-39.

** Appellees put their plea for a "candid appraisal" of FCA § 320.5 (3)(b) (brief at 77) aside when they claim that New York's child protective, and presumptively legitimate, purpose in the statute is not present. *See* appellees' brief at 20, 25, 56, 95. The New York Court of Appeals described the state's child protective purpose as "benefit of the juvenile" in *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39

(footnote continued on next page)

the statute's crime prevention purpose, as well as the state's underlying community and child protective interests in it (*see* p. 3 n.*), as establishing a legitimate governmental

N.Y.2d 682, 687 (1976), and held it applicable to detention under § 320.5(3)(b) when it upheld the statute. The purpose was codified for all sections of the Act shortly after the *Wayburn* decision as "needs and best interests" of the juvenile (along with "need for protection of the community"). *See* § 301.1 and intervenor's brief at 7 n.*. *Contrast* appellees' brief at 20, stating that the consideration of the "needs and best interests" of the juvenile is limited to the post-adjudication disposition sections of the Act. Indeed, the district court in this case relied on the child protective purpose involved in § 320.5(3)(b) to uphold the statute under the equal protection clause. A. 63-68.

In further contrast to appellees' claim, the testimony of Judge Quinones they cite (brief at 26) discloses a specific child protective concern about the juvenile's future criminal behavior, albeit one that is less weighty than the community's concern about pretrial juvenile crime. The juvenile, if detained under § 320.5(3)(b), is kept free of crime and the risks incident to that behavior (A. 269; *see also* A. 317-18 [Driscoll]), matters within his needs and best interests. Thus, to the extent the passage appellees cite in the majority opinion below (brief at 20) states that detention decisions under § 320.5(3)(b) "emphasize" the state's community protection purpose over its child protective purpose (A. 104), it is in accord with the testimony of Judge Quinones and unobjectionable. To the extent the passage states (A. 105) that the "criteria" for detention decisions under § 320.5(3)(b) "do not include the interests of the child," it is correct if "criteria" refer to considerations Family Court Judges generally apply in deciding whether there are "facts and reasons" (*id.*) warranting detention and again, unobjectionable. *See* Brief for Appellant Schall ("appellant's brief") at 36-38; intervenor's brief at 9, 43-44; appellees' brief at 20, 21 n.19. If, however, the passage means that Family Court Judges make detention decisions without regard to the state's child protective purpose in § 320.5(3)(b), it must be rejected as inconsistent with Judge Quinones' testimony and the legislative purpose of the Act expressed in § 301.1. *See Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979).

Given that New York's community and child protective interests in FCA § 320.5(3)(b) are restricted to its crime prevention purpose and were specifically so acknowledged by Judge Quinones (A. 269-70; *see also* A. 270, statute not to be invoked for broader "benefit," *e.g.*, to shock or reform the juvenile or to provide him with social or therapeutic services, A. 268) as well as elsewhere in the record (*see* intervenor's brief at 8 n.*), appellees are obliged to give it the deference they say is due juvenile justice standards that are not masked by facially benign labels-of-convenience. Appellees' brief at 75-77. Notwithstanding this deference to candor, appellees argue elsewhere (brief at 86-88, 95 n.65) that if § 320.5(3)(b) served more generalized child protective purposes, *i.e.*, it was not specifically crime-related, its likelihood of surviving due process scrutiny would be enhanced.

objective which is distinct from punishment.* In any event, case law authority upholds both adult and juvenile preventive detention under the due process clause, and, as appellees concede, every American jurisdiction uses juvenile preventive detention. *United States* v. *Edwards*, 430 A.2d at 1331-33; *Parker* v. *Roth*, 202 Neb. 850, 278 N.W.2d 106, 117, *cert. denied* 444 U.S. 920 (1979); *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y.2d 682, 689-90 (1976) (statute involved in case at bar). *See* appellant's brief at 23-24; Brief for Intervenor-Appellant ("intrevenor's brief") at 32-39.

An examination of FCA § 320.5(3)(b) in light of the other considerations that may be relevant in determining whether a restraint on liberty has an alternative or nonpunitive purpose (*see* pp. 2-3) discloses that detention under the statute is indistinguishable from detention under § 320.5(3)(a), its concededly regulatory counterpart. Both detention to prevent pretrial crime under § 320.5(3)(b) and

* Appellees do not argue at any point that preventing juvenile pretrial crime is an illegitimate governmental objective or punitive in itself. Instead, they advise the Court that it need not decide the issue (brief at 47, 50, 53, 60, 95-96) and, alternatively, suggest remand if the issue is reached because it was not decided by the Court of Appeals. Appellees' brief at 96 n.66.

Remand is unwarranted given the question of law involved was decided by the district court under the equal protection clause (A. 63-68), is included in the questions presented (*see* Jurisdictional Statement for Appellant Schall at i; Jurisdictional Statement for Intervenor-Appellant at i [question 1]) and considered in the opening briefs for appellant (at 17-18, 23-24) and intervenor (at 32-39). Nor will remand illumine the Court's consideration of the issue. The opinions of several courts of appeals, cited throughout the briefs for appellant and intervenor, provide guidance, and the construction of material sections of the Act is not in doubt.

Appellees' failure to establish that preventing juvenile pretrial crime is an illegitimate governmental objective or punitive in itself is fatal to their unconstitutional punishment argument for two reasons. First, absent other evidence of punitive intent or effect, the penal or regulatory character of restraints on liberty is determined in the nature of the relation to the governmental interests they involve. *Bell* v. *Wolfish*, 441 U.S. at 538. Second, the other evidence appellees offer with respect to FCA § 320.5(3)(b) does not distinguish the statute from its concededly regulatory counterpart, § 320.5(3)(a). It proves instead that both statutes are the same and, perforce, that § 320.5(3)(b) is regulatory. *See* pp. 5-6.

detention to assure appearance at trial under § 320.5(3)(a) incapacitate the juvenile to avoid reasonably predictable future conduct, and are equally "forward looking" for this reason. *United States* v. *Edwards*, 430 A.2d at 1332. Both detention standards are prospective in their community and child protection purposes. *See* p. 3 n.*, p. 3, n.**. For these reasons, both standards are equally "general and nonnormative." *Bell* v. *Wolfish*, 441 U.S. at 581 n.10 (*Stevens*, J. dissenting); *see* also *United States* v. *Edwards*, *supra* at 1332 n.29. Detention to prevent pretrial crime does not determine guilt or prescribe punishment. *United States* v. *Edwards*, *supra*, at 1332. Accordingly, a detention order under § 320.5(3)(b), like an order under § 320.5(3)(a), is "not backward-looking, personal, and normative." *Bell* v. *Wolfish*, *supra*; *United States* v. *Edwards*, *supra*, at 1332 n.29.

A comparison between pretrial detention under FCA § 320.5(3)(a) and § 320.5(3)(b) in relation to the second factor appellees select (brief at 101) from the *Wolfish* and *Mendoza-Martinez* list—whether the sanction applies to behavior that is already a crime—shows that the status of the criminal charge against the juvenile is exactly the same when detention under either standard is considered. Conditional and unconditional release and pretrial detention under § 320.5(3)(a) and § 320.5(3)(b) are considered at an accused delinquent's initial appearance in Family Court. *See* appellant's brief at 12; intervenor's brief at 2-6. Initial appearance follows arrest and the filing of a delinquency petition. *See* intervenor's brief at 2-3. By statute, the petition must be verified, charge at least one crime, and allege facts supporting each element of the crime(s) charged and of the juvenile's commission of them. § 311.1(2), (3)(e), (h), (4). The facts must be sworn to by individuals with personal knowledge of the events and "provide reasonable," or probable, "cause to believe" that the juvenile "committed the crime or crimes charged." § 311.2(2). Accordingly, if the need for pretrial detention

is considered at initial appearance, the status of the criminal charge against him is the same for purposes of both § 320.5(3)(a) and § 320.5(3)(b), arrest and probable cause petition.* *Contrast* appellees' brief at 105, 106, characterizing pretrial detention under § 320.5(3)(b) as more punitive than pretrial detention under § 320.5(3)(a) based on two inconsistent and equally false contentions: first, that detention under § 320.5(3)(b), but not under § 320.5(3)(a), means that the juvenile has done "something wrong in the past"; and second, that detention under § 320.5(3)(b), but not § 320.5(3)(a), is imposed for a "prior offense . . . in that arrest for a crime is a precondition". Appellees' further contention (brief at 104) that detention under § 320.5(3)(b), but not under § 320.5(3)(a), "stigmatizes" the juvenile because it rests on a finding that he is more likely than not to commit a pretrial crime is also false. Detention under § 320.5(3)(a) also rests on a finding that the juvenile is more likely than not to commit a pretrial crime, namely bail-jumping. New York Penal Law §§ 215.55-215.57 (includes release on recognizance).

A consideration of pretrial detention under FCA § 320.5(3)(b) in relation to the third factor appellees select (brief at 101) from the *Wolfish* and *Mendoza-Martinez* list—whether the sanction promotes the traditional aims of punishment, retribution and deterrence—shows that there are significant differences between detention under § 320.5

* The terms "probable cause petition" or "petition providing probable cause," used by intervenor throughout, incorporate two express state law requirements: first, that delinquency petitions "provide reasonable cause to believe" that a crime has been committed and that the juvenile named in the petition committed it (FCA § 311.2[2]; *see* § 311.1[2], [3][e], [h], setting forth requirements for specificity of allegations); and second, that the facts alleged to provide the required reasonable cause be "non-hearsay." § 311.2(3). The term "non-hearsay" means sworn statements made on personal knowledge. § 311.2; New York Criminal Procedure Law ("CPL") § 100.40(1). Judge Quinones illustrated the use of the non-hearsay rule when he said he would not require a complaining witness to testify at initial appearance but, instead, would require the witness to sign, *i.e.*, swear to, the petition (or a supporting deposition), if he had not already done so. *See* appellees' brief at 18 n.16.

(3)(b) and, for example, post-adjudication placement, which foreclose a punitive characterzation of the statute. A comparison between pretrial detention under § 320.5(3)(a) and § 320.5(3)(b) in relation to the aims of punishment shows again that § 320.5(3)(b) is indistinguishable from its regulatory counterpart.

As appellees observe (brief at 102-104), pretrial detention under § 320.5(3)(b) and post-trial punishment, for example, a dispositional placement for "supervision, treatment or [and] confinement" (§§ 301.2[7], 352.1[1]; *see* intervenor's brief at 13-15), share a means and an aim. The aim is deterrence of future crime, and the means is confinement, or incapacitation, of the juvenile. In contrast to the conclusions appellees draw, this seeming coincidence does not establish that detention under § 320.5(3)(b) is punitive in itself. *Edwards, supra,* at 1332-33, examined preventive detention and post-trial punishment in terms of confinement and deterrence when it upheld the District of Columbia statute and found the coincidence in means and aim to be only partial and the comparison itself, inaccurate. The same results obtain on examination of detention under § 320.5(3)(b) and post-adjudication disposition.

Under § 320.5(3)(b), as under the District of Columbia statute, deterrence of future crime is confined to the detainee and does not serve its post-adjudication role as an example to others. *United States* v. *Edwards,* 430 A.2d at 1333. Equally, under § 320.5(3)(b), as under the District's statute, confinement is for the brief pretrial period, a maximum of seventeen days (absent extraordinary circumstances) in New York, and ninety days in the District of Columbia, not for the lengthy terms associated with post-trial adult sentences and post-adjudication juvenile placements. *United States* v. *Edwards, supra. See* intervenor's brief at 14 n.* & n.**. Most significantly, *Edwards, supra,* observes that punishment has a rehabilitation aim which preventive detention lacks and could not properly include since guilt has not been determined. *United States* v. *Edwards, supra,* at 1333 & n.31. *See Ingraham* v. *Wright,* 430

U.S. 651, 686-87 (1977) (*White*, J. dissenting); *McGinnis* v. *Royster*, 410 U.S. 263, 273 (1973). Since as *Edwards*, *supra*, at 1333, observes further, the confinement/deterrence comparison does not consider this significant difference between preventive detention and post-trial punishment, it is incomplete and cannot support the conclusion that preventive detention is punitive under the *Wolfish* and *Mendoza-Martinez* aims of punishment factor.

Pretrial detention under FCA § 320.5(3)(b), like preventive detention under the District of Columbia statute, has no prospective rehabilitative component. *See* pp. 8-9.* However, post-adjudication dispositions, especially placements for a term with local commissioners of social services and the state Division for Youth, are specifically rehabilitative and nonretributive. Executive Law §§ 511-a(2). *Matter of Quinton A.*, 49 N.Y.2d 328, 334 (1980). Accordingly, the difference *Edwards* cites as significant in finding the District of Columbia statute regulatory rather than punitive is enhanced with respect to § 320.5(3)(b) since adult sentencing is generally less rehabilitative and is retributive, and § 320.5(3)(b) is entitled to greater deference under the aims of punishment factor than the District of Columbia statute received.

Notably, the aims of punishment argument appellees offer against detention under FCA § 320.5(3)(b) is not the

* Detained juveniles receive protective care, including education, recreation and counseling services in the least restrictive environment consistent with their social adjustment. *See* intervenor's brief at 10-11. There are approximately 950 detention beds in the state, approximately 550 nonsecure and approximately 395 secure. A. 159 (Bigley). Jail placements, separate from the adult population of the facility, are allowed only with the permission of the Division for Youth, and then for only 2 renewable 24 hour periods. 9 New York Codes, Rules and Regulations ("NYCRR") § 180.6. Detained juveniles are allowed emergency home visits (9 NYCRR § 180.9[c][5]), and nonsecurely detained juveniles may obtain 2 day passes, to assist in the preparation of their cases or for other appropriate reasons. Securely detained juveniles may apply to the court for release, for example, to assist in the preparation of their cases.

The average length of stay for juvenile delinquents in secure detention is 12.2 days, and 21.9 days in nonsecure detention. A. 161 (Bigley).

one they were required to make. Given their concession that detention under § 320.5(3)(a) is regulatory, they were obliged to show that detention to prevent pretrial crime under § 320.5(3)(b) promotes the aims of punishment in some way that detention to assure appearance at trial under § 320.5(3)(a) does not. They offer but two contentions on the point (brief at 104-105): first, that detention under § 320.5(3)(b) has a sentencing value whereas detention under § 320.5(3)(a) does not; and second, that detention under § 320.5(3)(b) is related to the "final goal" of the juvenile justice system, apparently because it involves a finding that the juvenile "is more likely than not to commit a crime," whereas detention under § 320.5(3)(a) reflects an independent societal interest in the accused's presence at trial. The first contention is false. Neither pretrial detention under § 320.5(3)(a) nor pretrial detention under § 320.5(3)(b) has any sentencing value at disposition. Only post-trial detention does, and then only for restrictive placements and in special circumstances. *See* intervenor's brief at 14n.**. The second contention is also false insofar as it omits consideration of New York's independent and permissible interests in pretrial detention under § 320.5(3)(b) (*see* pp. 3-4; appellant's brief at 23-24; intervenor's brief at 32-39) and assumes that a finding on likelihood of crime is involved only in detention under § 320.5(3)(b). As noted (p. 7), detention under § 320.5(3)(a) includes a finding that the juvenile is likely to commit a crime if released, namely "bail jumping." Indeed, the finding of likelihood of future crime that both detention standards require and their use of pretrial confinement, dissociated from prospective rehabilitation, to deter the behavior demonstrate again that § 320.5(3)(b) is the same as § 320.5(3)(a) in terms of the *Wolfish* and *Mendoza-Martinez* aims of punishment factor and perforce regulatory.

The four *Kennedy* and *Mendoza-Martinez* factors which appellees exclude from consideration are: whether the sanction involves an affirmative disability or restraint; whether

it has been regarded as punishment historically; whether it is applied after a finding of *scienter;* and whether it is excessive in relation to its alternative, non-punitive purpose. *Bell* v. *Wolfish*, 441 U.S. at 537-38; *Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 168-69. When the four factors are applied to FCA § 320.5(3)(a) and § 320.5(3)(b), the same results obtain for both detention standards. For example, detention under both § 320.5(3)(a) and § 320.5(3)(b) involves an affirmative restraint on liberty. The purposes of detention under § 320.5(3)(a) and § 320.5(3)(b), appearance at trial and prevention of pretrial crime respectively, are not now, and have not been, regarded as punishment under the due process clause. *Compare Bell* v. *Wolfish, supra*, at 533-35, 536-37; *id.* at 569 (*Marshall*, J. dissenting); *id.* at 581-84 (*Stevens*, J. dissenting) (pretrial detention to assure appearance not regarded as punishment), *with United States* v. *Edwards*, 430 A.2d at 1332; *Parker* v. *Roth*, 278 N.W.2d at 117; *Huihui* v. *Shimoda*, 64 Ha. 527, 644 P.2d 968, 977-78 (1982); *Blunt* v. *United States*, 322 A.2d 579, 584 (D.C. App. 1974) (pretrial detention to prevent crime not regarded as punishment). Neither detention standard involves a finding of *scienter*, and neither is excessive in relation to its alternative purpose. Both permit a juvenile to be confined before trial, a period exactly coextensive with their purposes, and both have exactly the same impact on a juvenile's interests in pretrial liberty.*

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* Intervenor notes, in addition, that pretrial detention to prevent crime is not punishment under the Eighth Amendment. *Contrast* appellees' brief at 100 n.70. The cruel and unusual punishment clause is not applicable to pretrial detention, *Parker* v. *Roth*, 278 N.W.2d at 117, and the excessive bail clause does not require that all crimes or particular crimes be considered bailable. *United States* v. *Edwards*, 430 A.2d at 1325-31; *Parker* v. *Roth, supra*, at 110-13; appellant's brief at 45 n.41; intervenor's brief at 33 n.*; *Brief of Amici Curiae Texas District and County Attorneys Association and The Legal Foundation of America* at 10-12.

B. The Standards and Procedures for Pretrial Detention under New York Family Court Act § 320.5(3)(b) Are Fundamentally Fair.

None of the arguments appellees advance (brief at 50-75) under the three factor test in *Mathews* v. *Eldridge*, 424 U.S. 319, 334-35 (1976), serves to invalidate FCA § 320.5 (3)(b). Under their principal argument (brief at 54-62), § 320.5(3)(b) is said to be invalid because it does not automatically exclude a class of crimes, which appellees repeatedly characterize as "petty" or "trivial" (brief at 52, 57, 60, 61) but nowhere define, from the assessment of serious risk of pretrial crime. The argument depends, in turn, on the first and second *Mathews* factors—the governmental and private interests involved in the statute—and appellees' conclusion, after comparing New York's interests in § 320.5 (3)(b) with a juvenile's interest in pretrial liberty, that the juvenile's interest clearly outweighs the state's interest in preventing such crimes. Appellees' brief at 54, 56-57, 60-61, 62.

In response, intervenor submits that the comparison and the conclusion it is alleged to support rest on legally insufficient reasoning. If appellees choose to compare the state's and the juvenile's interests in trivial and non-trivial pretrial crimes under *Mathews*, they are obliged to provide an objective basis for distinguishing between the two classes of crimes which permits the importance of the state's and the juvenile's interests to be assessed and compared. Indeed, without an objective basis for distinction, neither the state nor the juvenile has any ascertainable interest at all. They fail entirely to do so, eschewing a definition of trivial or non-trivial crimes or any other indicia of the crimes they include and exclude. As a result, when they purport to have assessed the importance of the state's and the juvenile's interests in trivial pretrial crimes and conclude that the interest of the juvenile is weightier than that of the state, they, in fact, made no assessment at all and provide the Court with *ipse dixit* instead. The insufficiency of appellees' reasoning is readily demonstrated by reference to their conclusion—appellees claim that trivial crimes must

be excluded from a preventive detention standard to permit it to withstand due process scrutiny, but they cannot say what they are or why they should be excluded.

Appellees' argument that the due process clause requires that some crimes be automatically excluded from preventive detention and their comparison between New York's interests in pretrial detention under FCA §320.5 (3)(b) and a juvenile's interest in pretrial liberty (brief at 54, 56-57, 60-61, 62) are flawed for other reasons as well. First, the argument falsely assumes that qualifying crimes with various labels—"dangerous," "violent," "property," "violent property," or "trivial"—has constitutional significance, that the labels have some uniform meaning and that their use improves detention decision-making, a point refuted by their own witness at the trial below. *See Jones* v. *United States*, —— U.S. ——, 103 S.Ct. 3043, 51 U.S.L.W. 5041, 5044 (June 29, 1983); intervenor's brief at 42-43.

Second, appellees' comparisons between New York's interest in preventive detention under § 320.5(3)(b) and a juvenile's interest in pretrial liberty omit considerations that are relevant to New York's all-crime standard. For example, the state's child protective interest in the statute is omitted from consideration but is, in fact, present, and the juvenile's interest in pretrial liberty is treated as equal to an adult's when it is not either on a direct comparison or in relation to an all-crime standard. *See* p. 3 n.** and intervenor's brief at 32-39.*

* Recent data on juvenile arrests in New York shows that the state's express community and child protective interests in FCA § 320.5(3)(b) and in the other sections of the Act (*see* pp. 3-5 and intervenor's brief at 32-39) are directed to a problem of substantial dimension. Based on the 1980 census, in 1982, there were approximately 1.7 million juveniles, aged 10 through 15, in New York, and they represented 10 percent of the total population. Census Population in Housing, 1980: Summary Tape File 1C, prepared by Bureau of Census, Washington, D.C., 1981. In the same year, juveniles under 16 accounted for 9.7 percent of all arrests for (index) violent crimes, 16.2 percent of all arrests for (index) serious property crimes, and 14.3 percent of all arrests for (index) violent and serious property crimes combined. 1982 New York State Uniform Crime Report: Adult Arrests by Age, Sex and Classification (New York State

(footnote continued on next page)

Third, appellees' failure to establish that the crimes allegedly excluded by the due process clause are non-recidivist crimes and their acceptance of the point established below (*see* intervenor's brief at 42-43)—some juveniles are pretrial recidivists but pose no risk of nonappearance—deprives the community of any pretrial response if juvenile justice standards are to be "candidly apprais[ed]" and applied as appellees insist (brief at 77). It is thus of interest that appellees elsewhere state (brief at 91) that New York should invoke § 320.5(3)(a), permitting pretrial detention to assure appearance at trial, to detain "[c]riminally [p]rone [j]uveniles" before trial.

Last, appellees' failure to state whether the crimes allegedly excluded by due process are predicate crimes, *i.e.*, those charged against the juvenile, or pretrial crimes, *i.e.*, prevented crimes, yields at least two alternative standards. Each relies on untested and inappropriate assumptions, neither improves upon the all-crime standard in § 320.5(3)(b). For example, if appellees are excluding predicate crimes, their apparent theory is that the juvenile who commits trivial crimes will only recidivate with trivial crimes and that 7 to 16 year olds have, and may be relied upon to pursue, crime specialties. If appellees are excluding pretrial crimes, they are requiring the judiciary to predict what crimes the juvenile will not commit, a task far in excess of that imposed by § 320.5(3)(b) and, by force

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Division of Criminal Justice Services); 1982 New York Juvenile Arrests Reported by Age (New York State Division of Criminal Justice Services).

Comparable data for the United States shows that the problem is of substantial dimension nationally as well. In 1982, there were 21.7 million juveniles, aged 10 through 15, in the United States, and they represented 9 percent of the total population. Current Resident Population Reports, Population Estimates and Projections, Series P-25, No. 929, Table 2 (Bureau of Census, May 1983). In the same year, juveniles under 16 accounted for 7.6 percent of all arrests for (index) violent crime, 19.9 percent of all arrests for (index) serious property crime and 17.3 percent of all arrests for (index) violent and serious property crimes combined. *1982 Crime in the United States* 176-77 (United States Department of Justice). (Index crimes are an FBI classification which consists of "violent crimes" defined as murder, non-negligent manslaughter, forcible rape, robbery and aggravated assault and "serious property crimes" defined as burglary, larceny-theft, motor vehicle theft and arson. *Id.*)

of their reasoning in this case, so speculative as to be unconstitutional *per se*.

Appellees' references to three juvenile case histories in the record (brief at 38-39, 57) to show that FCA § 320.5(3)(b) is applied to detain juveniles accused of trivial crimes do not serve that purpose. They do show that the statute is applied consistently with its community and child protective purposes and that each of the juveniles appellees identify posed a serious risk of pretrial crime. Ramos, the juvenile appellees note stole a pair of shorts, broke into the store to do it. He was charged with burglary 3 and related crimes. He was fifteen when he was detained under § 320.5(3)(b) on the allegedly trivial burglary charge, was already on probation as a result of a prior adverse fact-finding for criminal trespass and had seven prior contacts with the Family Court in addition to the criminal trespass finding. *See* plaintiffs' exhibit ("PX") 8a, b.

Dunaway, the juvenile appellees note stole subway-bus transfers, stole them on two separate occasions on the same day. He was charged with petty larceny and a related crime. He was thirteen when he was detained under § 320.5(3)(b), and, in addition, § 320.5(3)(a) (nonappearance) on the petit larceny charge appellees consider trivial. He was already on probation as a result of a prior adverse fact-finding on similar charges. He had threatened the complaining witness and to leave home. His mother informed the court that he came home late and didn't listen to her at all. PX 21a, b.

Parson, the juvenile appellees note was playing "three-card monte," was running the game. He was charged with promoting gambling 2 and a related crime. He was fifteen when he was detained under § 320.5(3)(b) on the gambling charge appellees consider trivial. He had seven prior Family Court contacts and had completed a placement with the Division for Youth. PX 18a, b.

Appellees' two other references to the record (brief at 59 n.45, 59-60 & 60 n.46) are equally unavailing to show that § 320.5(3)(b) is applied to detain juveniles for trivial

crimes, albeit for different reasons. State's exhibits O2, P2, Q2 and R2 display admissions to detention by crime. They combine pre-court admissions (*see* intervenor's brief at 3n.**), court-ordered admissions under § 320.5(3)(a) and § 320.5(3)(b), miscellaneous admission categories, *e.g.*, offending runaways from other jurisdictions held on warrants, as well as pretrial and post-trial admissions. The exhibits provide absolutely no basis for distinguishing among these categories or selecting out the category of interest here, pretrial detention under § 320.5(3)(b). Accordingly, the exhibits can tell nothing about the use of § 320.5(3)(b) to detain for trivial or non-trivial crimes. Appellees' Table V is drawn from these state exhibits and thus does not compare admissions to pretrial detention under § 320.5(3)(b) with the District of Columbia preventive detention statute, it compares all admissions to detention with the statute.

Appellees and intervenor agree that comparisons between the crimes charged in the thirty-three juvenile case histories and the list of detainable crimes in the District of Columbia preventive detention statute are instructive (*compare* intervenor's brief at 16n.**, 18n.*, 43, *with* appellees' brief at 57-60), but disagree on the results of the comparisons. On intervenor's count, twenty-two of the thirty-three juveniles are detainable under the District of Columbia statute because they were charged with the "dangerous crimes" (D.C. Code §§ 23-1322[a][1], 23-1331[3]) of taking property from a person with force,* entering a residence or business to commit another crime,** and arson.† One juvenile, McCain (PX 15a, b), is detainable because he was charged with a "crime of violence" (D.C. Code

* Allen (PX 27a, b), Ancrum (PX 35a, b), Basnight (PX 10a, b), Cox (PX 7a, b), Fargas (PX 26a, b), Forde (PX 7a, e), Gomez (PX 20a, b), Jacobs (PX 28a, b), Martin (PX 1a, b), Morgan (PX 3a, b), Price (PX 5a, b), Rosario (PX 2a, b) and Santiago (PX 13a, b).

** Gregoire (PX 23a, b), Jenkins (PX 4a, h), Lopez (PX 24a, b), McLaughlin (PX 43a, b), Melendez (PX 17a, b) and Ramos (PX 8a, b).

† Ascencio (PX 13a, e), Peebles (PX 14a, b), Rodriguez (PX 12a, b).

§§ 23-1322[a][2][ii], 23-1331[4]), assault while on release status for a predicate crime of violence, robbery, and another, Dunaway (PX 21a, b), is detainable because he threatened the complaining witness, D.C. Code § 23-1322 (a)(3).* *Contrast* appellees' brief at 57-58.

Intervenor and appellees appear to disagree about the District of Columbia statute in another respect. Intervenor submits that the statute's list of detainable crimes is neither a constitutional minimum for juvenile preventive detention nor an exclusive definition of non-trivial crimes. *Contrast* appellees' brief, *id.*

Appellees offer (brief at 63-75) two arguments against FCA § 320.5(3)(b) under the third factor in the *Mathews* v. *Eldridge*, 424 U.S. at 334-35, test, risk of error and value of additional or substitute safeguards. The first argument refers (brief at 63) at the outset to the alleged absence of criteria for detention decisions under FCA § 320.5(3)(b), but is, as appellees later state (*id.* at 70), intended to advance the proposition that any juvenile can be detained under § 320.5(3)(b) for any reason in the subjective and unfettered discretion of the court. *Id.* at 64, 70. The proposition is opposed by the express terms of the statute. Any juvenile charged with a crime is considered for release or detention under FCA § 320.5(3)(b), and § 320.5(3)(a) (non-appearance), as any adult charged with a crime is considered for bail, and, in certain jurisdictions, preventive detention. Under the statute, the juvenile is heard on the reasons for release or detention (*see* intervenor's brief at 5-7), and he may be detained only on serious risk of pretrial crime, and only then with the facts and reasons supporting detention stated in the record. *Id.*

The proposition is also opposed by the patent legal sufficiency of the statute and its necessary, limiting effect on

* Of the remaining 9 juveniles, 3 were charged with "crimes of violence" under the District of Columbia statute but did not have predicate crimes of violence. Delgado (PX 19a, b), Cruz (PX 11a, b), and McArthur (PX 6a, b). Five others were on release status or probation on other charges or findings. Hanna (PX 4a, e), Harris (PX 16a, b), Nelson (PX 22a, b), Taylor (PX 16a, e), and West (PX 25a). West was on both release status and probation. One, Parson (PX 18a, b), had 7 prior contacts.

unfettered judicial discretion. Serious risk of pretrial crime is a sufficient post-arrest standard of judicial decision under the due process clause. *United States* v. *Edwards*, 430 A.2d 1321, 1342 (D.C. App. 1981) (en banc), *cert. denied* 455 U.S. 1022 (1982). The facts and reasons requirement, which shows why a serious risk of pretrial crime was found by a trial court in a particular case, has been held sufficient under the due process clause for critical stages of delinquency proceedings, *Kent* v. *United States*, 383 U.S. 541 (1966), and for enhanced restraints on adult liberty as well, *Wolff* v. *McDonnell*, 428 U.S. 539 (1974).* As appellees now acknowledge (brief at 67), common general considerations, or criteria, including "prior record . . . seriousness of the charge" (A. 105 [majority opinion below]), guide the application of the standard.** The § 320.5(3)(b) standard itself, the facts and reasons requirement incident to it as well as the general considerations applied by Family Court Judges and the transcript of the detention hearing itself oppose appellees' characterization of decision-making

* Appellees attempt (brief at 69 n.50) to distinguish *Kent*, *supra*, on the ground that it did not consider the substantive basis for the decision to transfer the juvenile there involved from juvenile court to adult criminal court. They thus mistake the procedural protections the *Mathews* v. *Eldridge*, 424 U.S. at 334-35, test considers and *Kent* provides for substantive law concerns. They thereby reveal that their true concern at this point is not the alleged unfettered discretion of Family Court Judges under FCA § 320.5(3)(b), but New York's all-crime detention standard. *See also* appellees' brief at 70 n.52 suggesting alleged judicial subjectivity under § 320.5(3)(b) be reduced by limiting preventive detention to certain predicate felonies.

** Appellees quote (brief at 67-68) Judge Quinones' statement that "we all have our own standards and . . . means for determining in our minds the seriousness of the allegations." From this single reference (they provide no other), they attribute to him their own characterizations of FCA § 320.5(3)(b) as fostering unfettered and non-uniform judicial decision-making. Judge Quinones' statement serves exactly the opposite purpose. As appears from the portion of the majority opinion quoted in the text, his reference to the seriousness of the allegations described one of the general considerations, or criteria, appellees themselves now accept for assisting decision-making under § 320.5(3)(b). Claiming that the seriousness consideration, or criterion, must itself be subject to a further limitation because it has a risk of non-uniform or subjective application asks both the inappropriate and the impossible. All guides to decision must become subjective at some point lest there be no decision at all.

under the statute as the exercise of unfettered discretion.* Indeed, the decision-making procedure under § 320.5(3)(b) is exactly the same as the procedure under § 320.5(3)(a), which appellees accept (brief at 93, 94-95) as constitutionally sufficient in all respects.

Appellees' reference (brief at 63) to a "high rate of unnecessary detention" attributable to FCA § 320.5(3)(b) is completely unjustified. The only evidence in the record about detention rates was provided by the Director of Detention Services of the State Division of Youth who informed the district court of the ten percent standard recommended by the National Council on Crime and Delinquency ("NCCD") (A. 163). The standard is for juveniles detained securely as a percentage of all juveniles arrested. *Id.* It has no separate reference to particular forms of detention, *i.e.*, to prevent crime as distinguished from nonappearance, and, in any event, no data was available which would have permitted those comparisons. The NCCD comparisons, secure detainees as against arrests, were made below, conform with the ten percent level and have remained unchallenged throughout this litigation.** Appellees apparently have reference to the majority opinion below which does not consider a detention rate but a legal theory. According to theory, two-thirds of juveniles detained under § 320.5(3)(b) are unconstitutionally punished because they were either released at or before trial or not placed after trial. *See* intervenor's brief at 23-28. The theory was discredited (*id.* at 46-47) and has been abandoned by appellees in this Court. Accordingly, they

* The fact that time in pretrial detention is brief does not mean that it is not readily addressed by writ of habeas corpus and other remedies. Intervenor's brief at 10 n.*. The New York courts have also routinely treated writs raising significant and certainly constitutional issues as capable of repetition yet evading review and addressed their merits. As intervenor observed (brief at 20 n.*), no motion was made to dismiss *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y.2d 682 (1976), or this case as moot. *Contrast* appellees' brief at 71 n.53, quoting district court's erroneous statement to the contrary.

** The rates and underlying calculations are set forth in intervenor's proposed finding of fact ¶ 48. Record on Appeal Document Number 26A.

cannot rely on it to illustrate alleged unnecessary detention which simply restates the abandoned punishment rationale. For example, Forde's detention under § 320.5(3)(b) is no more unnecessary than it was unconstitutional punishment because he was released when a courtroom was not available for his probable cause hearing. PX 7f.

To the extent that the majority used the ratio of pretrial detentions to releases for the thirty-four juveniles to reflect the system as a whole, it did not affirm a district court finding of fact, as appellees contend, it vacated one (*compare* intervenor's brief at 22 n.* *with* 24 n.**) and erroneously substituted its own. *Pullman Standard* v. *Swint*, —— U.S. ——, 102 S.Ct. 1781, 1782 (1982). The majority opinion's substituted finding was clear error since the thirty-four juvenile histories were not an adequate random sample from which to draw statistical conclusions about all juvenile delinquency proceedings in New York.

Conclusion

For the foregoing reasons, the judgment below should be reversed and New York Family Court Act § 320.5(3)(b) declared constitutional under the due process clause.

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